Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Review of the Commission's Regulations Governing Attribution of Broadcast Interests	)	MM Docket No. 94-150
Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry	)	MM Docket No. 92-51
Reexamination of the Commission's Cross-Interest Policy	)	MM Docket No. 87-154

REPLY COMMENTS OF THE ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC.

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July 10, 1995

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The Association of Independent Television Stations, Inc. ("INTV"), hereby submits its reply comments in response to the above-captioned proceedings.

The overwhelming majority of those commenting favored the relaxation of the stifling attribution rules to open television broadcasting to greater investment and allowing it to remain competitive in the modern video market. The attribution rules were designed to protect diversity in broadcasting; however, the relatively recent boom in alternative video delivery services has changed the market- minimizing the diversity

concerns and greatly increasing competition for investment dollars. As recognized by the FCC in 1991, the video marketplace is "highly competitive" and will only become more so.[1]

In 1953, when the attribution rules were first considered[2], television was a neophyte in the media marketplace and was the only medium available to display simultaneous audio and video images. At that time, preserving diversity in television broadcasting was a product of common sense. Now, the range of multi-media alternatives is rapidly expanding and not only is broadcasting diversity no longer in need of protection, but it can hardly be prevented.

STOCKHOLDER BENCHMARKS

Voting Stock:

The attribution of those shareholders who own five percent or more of the voting stock in a corporation is quite simply not suited to the current state of the broadcast industry. Not only did a vast number of commenting parties agree with the Commission's proposal to raise the benchmark, but some commentors also felt the standard was not going high enough.[3]

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[1]Office of Plans and Policy, Working Paper No. 26, Broadcast Television in a Multichannel Marketplace, 6 FCC Rcd. 3996 (1991).

[2] In the Matter of the Amendment of Sections 3.35, 3.240 and 3.636 of the Rules and Regulations Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, Report and Order, 18 FCC 288 (1953)(the "1953 order").

[3]Comments of M/C Partners, The Blackstone Group, and Vestar Capital Partners, MM Docket Nos. 94-150, 92-51, and 87-154, filed May 17,1995 at 16-18 (hereinafter cited as "M/C").

Several persuasive reasons for raising the attribution level for voting stock interests in a corporation from five to ten percent were raised in the comments. First of all, the difference between the level of control and influence that a stockholder may exert is minimal as between a five and ten percent holding and "even in situations where there is no single majority shareholder, shareholders owning between ten and twenty percent most often do not exercise significant influence or control."[4] When an investor makes a non-controlling equity investment in a corporation, the voting rights associated with that investment do not create such an amount of control over the entity that the investing party should be subject to attribution rules.[5]

Secondly, as noted by the Commission, other federal agencies use a ten percent equity benchmark in a regulatory context[6], including the Securities and Exchange Commission (SEC) for insider trading restrictions. The SEC's ten percent benchmark was established to reflect a level of ownership interest that does not amount to sufficient control.[7] This presumes that only interests which amount to ten percent stock ownership or greater are sufficient to make unfair use of inside information regarding corporate activities. The potential implications for problems relating to insider trading overwhelm those in the communications context. Insider trading can serve to disrupt global financial

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[4]Comments of Tribune Broadcasting Company, MM Docket No. 94-150, filed May 17, 1995, at 21 (hereinafter "Tribune").

[5]M/C at 17.

[6]*Notice of Proposed Rule Making* in MM Docket No. 94-150, FCC 94-324, (released January 12, 1995), (hereinafter "Notice") at paras. 39-44.

[7]Tribune at 23.

markets and undermine faith in the fairness of the stock market which could alter the entire economy.[8] The attribution benchmark for the communications industry should, at least, be set at par with that of the SEC.

In two other regulatory contexts the stockholder benchmark stands at ten percent, furthering the notion that this is the level at which potential control begins to become a concern. First, Congress has enacted such a mark by implementing acreage limitations to federally leased mineral rights. This allows the Department of Interior a mechanism to enforce ownership restrictions applicable to publicly owned, limited resources.[9] The Department of Transportation has also set forth a ten percent benchmark, requiring compliance with certain reporting and certification requirements applied to air carriers, noting that only such stockholders have "the potential for significant influence on a carrier's operations."[10] This benchmark was adopted to determine "a level of ownership below which a stockholder generally does not exercise a sufficient level of influence to implicate any of the policies or objectives at issue,"[11] an objective similar to that of the Commission here.

Finally, the need to promote competition in the broadcasting industry necessitates finding potential lenders of capital and making an investment in the broadcasting industry

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[8]INTV Comments, MM Docket No. 94-10, filed May 17, 1995, at 4.

[9]30 U.S.C. 184(d); *Notice of Proposed Rulemaking*, MM Docket No. 92-51, 7 FCC Rcd. 2654 (1992).

[10]*Notice of Proposed Rulemaking*, 56 Fed. Reg. 27696, 27699 (June 17, 1991).

[11]Tribune at 23.

more attractive. These benchmarks were created to promote competition in the broadcasting industry by not allowing large investors to wield power and control over a large number of licensees. Currently, the benchmarks are reducing potential investors in the industry which is, in turn, eliminating potential funding for a number of broadcasters, especially those new and inexperienced entities which would benefit the most from increased investment. This decreases competition by creating a great barrier to entry into the industry. The present benchmarks are now working against what they were originally intended to accomplish and therefore must be raised.

Vital factors for successful entry into this market include access to capital, experience, and facilities that can be operated on a scale providing efficiencies comparable to larger, more established competitors. "The proposed increase in the benchmark will increase the ability of smaller companies to recruit a critical level of investment from investors who will not have cognizable influence or control over the venture" but can provide the above elements. necessary for any new media entry.[12]

Due to the increased competitiveness which has come with the multitude of new media options to over-the-air broadcasting, it is absolutely necessary to open broadcast investment to non-controlling interests. Raising the voting stock benchmark to ten percent would help broadcasters raise necessary capital, promote competition and would not result in a loss of control for the licensees.

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[12]Tribune at 22.

Passive Investors:

For many of the same reasons the five percent benchmark should be increased for voting stock, the ten percent level should be increased to twenty percent for those investors with a truly passive interest. Generally, the day to day influence that a passive investor has in a corporation is minimal. The Commission should further open the door for these interests, which will be beneficial for both qualified institutional investors and for the Commission. The institutional investors will be better able to take advantage of growth opportunity by investments in broadcasting and the Commission will minimize its regulatory role.[13] "The inherently passive nature of the investors eligible to use this benchmark, together with the required certification of noninvolvement in the affairs of the licensee, adequately prevents any undue influence that might otherwise be associated with the suggested twenty percent passive investor limit."[14]

It is also in the best interest of the industry to expand the class of qualified "passive" voting shareholders to include investment entities which are similar to those that are currently allowed. At a minimum, this class should be opened to investment and commercial banks. "Investment banking services do not materially relate to the media activities ... because rendering such services does not place the investment bank in a position of influence and control and, thereby, directly intrude on the management

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[13]Tribune at 25.

[14]Comments of CBS, Inc., MM Docket No. 94-150, filed May 17, 1995, at 9.(Hereinafter CBS)

or operation..."[15] The Commission already has a passivity standard in place which ensures that such investors are truly passive.[16] In the *1992 Capital Formation Notice*, the Commission recognized that broadening the passive investor category will "substantially benefit the broadcast and cable industries by affording them access to new sources of capital."[17] The competitive state of television broadcasting demands modernizing the stockholding benchmarks to increase investment and, as long as the Commission is confident the passivity standard will do its job, there is no reason not to raise this benchmark to twenty percent.

NON-ATTRIBUTABLE INTERESTS

The majority of the commentors on this subject agreed that there is, quite simply, no reason to make heretofore non-attributable interest cognizable under its attribution rules. The Commission is off base in purporting to change these rules due to hypothetical concerns regarding attempts to circumvent policies which have no factual basis.

When a stockholder owns non-voting stock, they have no legal power to control the affairs of a corporation. The attribution rules should focus on control rather than imagined situations regarding future implications of current, non-attributable interests. The FCC should concentrate on regulating only those parties who can currently affect

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[15]Comments of The Goldman Sachs Group, L.P., MM Docket No. 94-150, filed May 17, 1995 at 7.

[16]Notice, at par.47.

[17]*Notice of Proposed Rule Making and Notice of Inquiry*, MM Docket No. 92-51, 7 FCC Rcd. 2654, par. 1 (1992).

the decision-making process of a corporation and should leave problems, such as converting non-voting to voting shares,[18] to the more appropriate multiple ownership rules.[19]

The Commission also requested comment on the treatment of new business forms, specifically limited liability corporations (LLC).[20] LLC's are created to take advantage of the tax benefits of a partnership and the limited liability of the corporate structure. To retain consistency in the policies of the Commission, the regulations should be tailored to the actual operational structure of the business. An LLC should be treated like a corporation if they are controlled like a corporation and like a partnership if controlled as such.[21]

To adopt a strict rule regarding LLC's, while providing for certainty, would be arbitrary and inconsistent with Commission practices and "unsupported by the practical business reality."[22] As a hybrid business form, a LLC can be managed as either a partnership or a corporation and should be dealt with in a manner consistent with how it acts. For example, the Internal Revenue Service, as well as other government

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[18]Notice at para. 54.

[19]INTV Comment at 8.

[20]Notice at paras. 64-75.

[21]Tribune at 7.

[22]Ibid at 10.

agencies, looks at the statute allowing for LLC creation in each state to determine exactly how it will treat the entity.[23]

By holding the LLC to the same attribution standards as a limited partnership, the Commission will diminish the attractiveness of this business form. "The flexibility which helps to make the LLC an attractive business form for investment in the broadcast industry will be defeated if the FCC refuses to permit each LLC to be treated in accordance with the manner in which it is managed and controlled."[24] This will minimize the ability and desire of investors to take advantage of this new business form by providing capital to the communications industry. By allowing an LLC to be treated like a corporation if that is how it is structured, the FCC will be encouraging investment, competition, and fairness. While enacting a broad, sweeping rule which mandates treating a LLC as a limited partnership when structured as a corporation, the FCC would curtail the ability of a company to invest in the broadcasting industry by saddling it with an attributable interest.[25] The convenience of a rule treating all LLC similarly, while intuitively appealing, would be detrimental to the industry.

CROSS-INTEREST POLICY

The cross-interest policy should be eliminated as it is no longer necessary and only serves to create uncertainty and ambiguity in broadcasting investment. "The policy imposes administrative burdens on investors and impedes the ability of broadcasters to

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[23]Ibid.

[24]Ibid.

[25]Ibid.

attract equity investment capital through the use of non-attributable equity interests because the policy can be invoked to prohibit a seemingly permissible transaction."[26]

The Commission has acknowledged that "the ad hoc development of the policy has had the unintended effect of surrounding certain media transactions with a cloud of uncertainty."[27] The FCC also recognizes the administrative burdens, both on the Commission and on applicants, of a case-by-case review and enforcement of the cross-interest policy.[28]

Even without these burdens the policy is no longer necessary as the goals of the cross-interest policy are adequately served by the current attribution and antitrust rules. The attribution thresholds are adequate to guard against potential control problems and thus an investment in the media industry should not be further clouded by a stifling combination of rules and policies.

The Commission asks in the Notice if the adoption of the proposed changes in the attribution benchmark for stock provides new reason to retain the cross-interest policy. However, the two regulations should remain separate. There is little sense in raising the stockholder benchmark only to weigh it down with a separate set of regulations. If a ten percent benchmark for voting stock does not warrant attribution, then that

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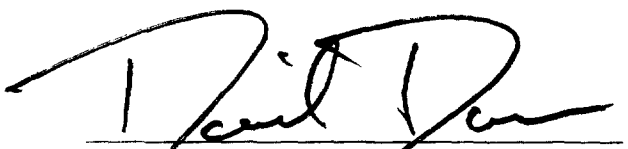
[26]Comments of California Public Employees' Retirement System, MM Docket No. 87-154, filed May 17, 1995 at 23.

[27]Policy Statement in MM Docket No. 87-1554, 4 FCC Rcd 2208, 2217 at para. 27.

[28]Notice at para. 90.

determination should prevail. A recurring theme in the comments to this notice is the desire for the Commission to adopt a more straightforward set of rules.[29] In this case, raising the benchmark but then tightening or retaining the cross-interest policy may prove to be more restrictive than liberating.

Respectfully submitted,



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[29]CBS at 17.